SHAW BROTHERS (KL) SDN.BHD.

v.

LEMBAGA BANDARAN, KOTA BHARU & ANOR.

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
ABDUL HAMID OMAR FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 179 OF 1982]
27 JANUARY 1984

LANDLORD AND TENANT: *Increase in valuation of property - Whether valid - Revaluation exercise - Whether valid - Notice - Whether occupier entitled to notice - Sections 29, 31 Kelantan Municipal Enactment 1938 - Recovery of excess rent - Controlled premises - Whether rent in excess - Control of Rent Act 1966, ss. 5, 27.*

CIVIL PROCEDURE: *Revaluation exercise - Questioned by declaratory suit - Whether valid - Applicability of s. 33 Kelantan Municipal Enactment 1938.*

The appellant ("the tenant") have been a tenant of the 2nd respondent ("the landlord") of the Rex Theatre in Kota Bharu, Kelantan, under two leases, the first effective from 1 September 1963 to 31 August 1973 and the second from 1 September 1973 for a period of five years. The premises were subject to control of rent legislation and the tenant becoming aware of this and considering the rent excessive, demanded a refund of the excess. The landlord however applied to the Lembaga Bandaran, Kota Bharu ("the LBKB") for an increase of valuation of the annual value of Rex Theatre. The increase was approved by the LBKB's Finance Committee. No notice of the decision was posted at the Rex Theatre, nor any notice sent to the tenant. The tenant, on finding out about the revaluation and having it confirmed by both the LBKB and the landlord, commenced two actions, one for the recovery of the excess and the other for a declaration that the revaluation exercise with the consequential increase of the rates was null and void. Both actions were dismissed by the trial Judge. The tenant appealed.

Held:

A. Validity of the revaluation exercise

[1] The LBKB was under an obligation to issue notice regarding the revaluation exercise. Under s. 29 of the Kelantan Municipal Enactment, 1938, notice of the proposed revaluation must be given to "all persons interested". Not only the owner but the occupier too was entitled to the notice of the revaluation exercise by virtue of the above section and also s. 31.

[2] As the requisite notice to the tenant was not given, the revaluation was null and void, in so far as the tenant was concerned.

[3] Regarding the landlord, however, there was no reason why the revaluation should be impugned because he had asked for the revaluation and had acted as if the application had been approved.

[4] The fact that the tenant had not lodged an appeal under s. 33 to the High Court but had proceeded to question the validity of the revaluation exercise by way of a declaratory suit was purely a procedural point. Section 33 did not apply to defeat the case, for as the tenant had not been given any notice and could not have made any complaint or objection the facts fell short of bringing the case within the ambit of the section.

[5] In view of the conclusion of the lack of notice to the tenant, there was no need to deal with the question of the revaluation exercise having been decided by the Finance Committee instead of the whole Board.

B. Recovery of excess rent

[1] The tenant's claim to recover the rent paid from 1 January 1969 to 31 August 1973 under the first lease must fail.

(a) As the rent was the one agreed to before 30 June 1964, and payable on that date, the rent became "the standard rent" under the 1964 Kelantan Enactment and was perfectly lawful, though not fixed by the Rent Assessment Board, and continued to be so until the Enactment was repealed by the Control of Rent Act, 1966.

(b) The rent continued to be legal under the 1966 Act ("the Act") as provided by the proviso to s. 27 of the Act.

(c) Until the rent, thus saved by the proviso, was revised and a "fair rent" fixed in accordance with the Act, there was no question of excess of rent which would entitle the tenant to bring a suit to recover.

[2] The tenant's claim to recover excess of rent under the second lease must fail too. The "fair rent" receivable by the landlord under s. 5 of the Act is not to be determined by the Court but by mutual agreement of the parties or by the Rent Officer or the Tribunal and until this is done, the Court cannot exercise jurisdiction to decide on the question what "fair rent" is. *(Haji P.M. Abu Bakar v. Madam Gan Jin Sim* (Kota Bharu, High Court, Civil Suit No. 43 of 1966).

C. Costs

The costs of the LBKB must be borne by the landlord as the LBKB was drawn into the dispute by the landlord's insistence on paying higher rates.

[Appeal regarding the first suit allowed with costs. Appeal regarding the second suit dismissed with costs. Deposit of appeal to be refunded to the appellant.]

Legislation referred to:
Control of Rent Act 1966, ss. 5(2), 27
Municipal Enactment 1938 (Kelantan), ss. 19, 33

For the appellant - R. R. Sethu; M/s. Adnan, Sundra & Low
For the respondent - Dato' H. L. Wrigglesworth; M/s. Wriggleswoth & Co.

JUDGMENT

Salleh Abas CJ (Malaya):

This is an appeal from the decision of Mohd. Zahir J which arose from a consolidated hearing of two civil suits, i.e. CS Nos. 57 and 89 of 1975 instituted by the appellant on 9 April 1975 and 22 May 1975 respectively in the High Court at Kota Bharu.

The facts are as follows: The appellant (in this judgment referred to as "the tenant") have been a tenant of the second respondent (in this judgment referred to as "the landlord") of a cinema hall in Kota Bharu, Kelantan, called Rex Theatre.

There were two leases signed between them. The first lease was signed on 29 October 1963. It commenced on 1 September 1963 and expired on 31 August 1973 at a rental charge of RM2,000 per month. The second lease was signed on 28 February 1974 and it was backdated to begin on 1 September 1973 for a further period of five years at a rental charge of RM6,000

per month, of which RM1,000 was for the rental of furniture. After the second lease was signed, the tenant became aware that Rex Theatre was subject to control of rent legislation and considering that the rent was excessive, the tenant instructed their solicitors M/s. Chin, Sethu & Co., to demand the refund of the excess. (See M/s. Chin, Sethu & Co's letter dated 14 May 1974 - p. 131 of appeal record). M/s. Wrigglesworth & Co. on behalf of the landlord on 23 August 1974 (p. 143 AR) replied denying any such excess. However, some thirteen (13) days before this letter was written i.e., on 10 August 1974, to be exact, the landlord went to see the President of the first respondent, the Lembaga Bandaran, Kota Bharu (in this judgment referred to as "the LBKB") with a letter asking for an increase of valuation of the annual value of Rex Theatre, presumably in order to justify the rent which he charged his tenant. In that letter he gave a computation of arrears of rates payable by him based on the increased annual value that he desired and together with it he enclosed a cheque for RM7,860.00 as payment of the arrears for one year from 1 July 1973 to 30 June 1974 (p. 139 AR).

This application was looked into by the LBKB's Assessment Officer, who on the same date recommended it to the President for acceptance. On 24 October, 1974 the LBKB's Finance Committee met and amongst items considered was this application. The Committee agreed to increase the rate applied for and fixed the effective date of the increase to be from 1 January 1974 and not from 1 July, 1973 as asked by the landlord.

After this decision, the LBKB issued a public notice of intended increase on 30 October 1974 and had it posted on 2 November 1974 in various districts of Kelantan but not at Rex Theatre itself. On 1 November 1974 the LBKB sent a specific notice to that effect to the landlord, the applicant, but no such notice was ever sent to the tenant. In the meantime the tenant must have heard of the "charitable" manoeuvre of the landlord, because on 4 November 1974 the tenant wrote a letter to the LBKB asking them to confirm whether any revaluation exercise of the cinema hall would be held and, if so, they would like to be notified so that they could make the necessary objections. However, despite this letter (p. 163 AR) on 16 December 1974 the LBKB proceeded to complete the revalution exercise by having it authenticated and certified.

On 4 November 1974 the tenant also wrote to the landlord's solicitors requesting them to confirm the information. The solicitors did not reply to the letter until 8 February 1975 whilst the LBKB only replied on 3 April 1975, apparently after they were reminded by another letter from the tenant (see letter dated 7 March 1975 - p. 173 AR). It was a result of these replies that the tenant knew for certain that the annual value of the Theatre was increased to RM60,000 a year effective from 1 January 1974.

Of the opinion that they had paid excessive rents under the two leases, the tenant commenced civil suit CS No. 57/75 for the recovery of the excess, and being aggrieved for being kept in the dark about the increase of the annual value of Rex Theatre, they commenced another civil suit CS No. 89/75 asking for a declaration that the revaluation exercise with the consequential increase of the rates was null and void. These two civil suits were tried together by Zahir J without hearing oral evidence. The learned Judge dismissed both the suits.

For the sake of convenience, we propose to deal with CS No. 89/75 first.

CS No. 89/75 - Whether the revaluation exercise is valid?

It is the case for the tenant that the revaluation exercise of the cinema hall was null and void for the following reasons:

(1) the tenant as occupier thereof was not given any notice of the proposed revaluation; and/or

(2) the decision to revalue the property was not arrived at by the whole Board.

In Kelantan the valuation of rateable properties to determine their annual value for the purpose of rates is governed by ss. 19 to 33 (inclusive) of the Kelantan Municipal Enactment 1938. Under these sections, whether a property is valued for the first time or whether it is a revision of its existing annual value, the local authority carrying out the exercise must give notice to the person interested, informing him of his right to make objections to the proposed valuation or revaluation and of the date on which such objections would be heard and considered. Section 29 requires the local authority concerned to issue two notices. One notice is a public notice which has to be posted at conspicuous places within its area, and the other is a special notice to "the owner or occupier" of the premises affected by the exercise. It is the contention of Counsel for the LBKB that the provision of s. 29 was fully complied with by the posting of a public notice (Exhibit D2) dated 30 October 1974 (p. 218 AR) and the sending of a special notice (Exhibit D1) dated 1 November 1974 to the landlord (p. 217 AR), although the tenant who were the occupiers were never kept informed. His submission is that the LBKB are not obliged under this section to give the notice to both the owner and the occupier. They are obliged to give such notice only to either of them.

With respect, we are unable to accept this submission. Section 29 is a complex section and contains many provisions, but the one immediately relevant for our purpose is as follows:

> ... and in all cases in which any premises are for the first time assessed or the assessment thereof is increased ... the Board shall also give notice to **the owner or occupier...** (emphasis is ours)

In our view the word "or" in the context of this provision will have to be read conjunctively and not alternatively. This is made clear by the provisions of s. 31 which specifically deals with a revaluation exercise. Under this section notice of the proposed revaluation shall be given to "all persons interested" and such persons "shall be allowed an opportunity of being heard in support of" any objections they wish to make. Although the Enactment does not define **"all persons interested"**, this expression must obviously mean "all persons who have interest in the properties" affected by the exercise. Surely, not only the owner who receives the rent should be considered as having interest to be protected, but the tenant or occupier who pays it should also be similarly treated, as any increase in the annual value would result in the increase of rate and finally the increase in the rent he has to pay to the owner. Therefore, in our view the occupier is also entitled to the notice of the revaluation exercise both by virtue of s. 29 and s. 31.

In this case the revaluation exercise undertaken by the LBKB began on 10 August 1974 when the landlord went personally to see the LBKB's President and ended on 16 December 1974 when two members of the LBKB certified the revaluation list of the non-existence of any valid objection against it. (Exhibit D4, p. 20 AR). The certification was undoubtedly done in purported compliance with s. 30(i) and s. 31(iv), which reads as follows:

> 30(i) After the complaints have been enquired into and the revision of valuation of the assessment has been completed, the amendments made shall be authenticated ... by the signature of two members of the Board, who shall at the same time certify that no valid complaint has been made against the valuation and assessment ... .

31(iv) Any amendment made in the list in accordance with this section shall be authenticated ... by the signature of two members of the Board.

But we do not understand why the LBKB ignored the tenant's letter of 4 November 1974 when it is clear from that letter that the tenant would object to the revaluation exercise if they knew that the exercise would be held. In view of this letter, our judgment is that the LBKB's certification stating that no valid complaint has been made is nothing but really a perversity of truth. The LBKB should have acted on the letter and should have sent the requisite notice immediately to the tenant. They should not have left it unreplied till after the exercise was over.

We cannot help observing that the LBKB seemed determined to keep the revaluation a secret - at least from being known to the tenant. This attitude is probably prompted by the advice given by the assessment officer (see his minutes dated 10 August 1974 at p. 141 AR to the President of the LBKB).

We also do not understand why the landlord's solicitors chose not to reply to the tenant's letter of 4 November 1974 until 8 February 1975 when, by then, the revaluation exercise was over. On the other hand, whilst the solicitors may not wish to release the information, surely there is no reason at all for the LBKB to likewise keep the tenant uninformed. It is their public duty to perform their functions and exercise their powers in accordance with law. In this case they were under an obligation to issue the requisite notice to the occupier and as they did not do so the revaluation must in so far as the tenant is concerned have no other result than that it is null and void. As regards the landlord, there is no reason why the revaluation should be impugned because this is what he had eagerly asked for and acted as if his application was approved.

In his judgment the learned Judge said that the tenant should have lodged an appeal under s. 33 to the High Court and that as this was not done, the revaluation exercise cannot be questioned by a declaratory suit. In our view, this is purely a procedural point. The right of appeal under s. 33 is given to a person "who having made a complaint or objection." In the present case, the tenant was not given a notice at all. How on earth could they make a complaint? In our view, s. 33 did not apply to defeat this case, as the facts fell far too short to bring it within its ambit.

Finally, in view of our conclusion on the lack of notice to the tenant, there is no need for us to deal with the question of the revaluation exercise being decided by the Finance Committee instead of by the whole Board. Our judgment is that as far as the tenant is concerned the revaluation exercise was null and void.

CS No. 57/75 - The recovery of excess rent:

This issue arose in CS No. 57/75. In this suit the tenant claimed that the rental they had paid under the two leases signed on 29 October 1963 and 28 February 1974 was far in excess of the rent allowed under the Control of Rent Act 1966. There is no dispute that Rex Theatre is a rent controlled premise. In this suit the tenant made a claim for recovery of the following sums:

(a) a sum of RM79,332.96 representing an excess of rental paid in the period from 1 January 1969 to 31 August 1973;

(b) a sum of RM51,245.10 being an excess of rental paid in a period from 1 September 1973 to 30 June 1974;

(c) a sum of RM57,374.53 being an excess of deposit paid under the second lease.

The claim is based on the proviso to sub-section (2) of s. 5 of the Control of Rent Act 1966, which proviso, though not part of the Act when it was originally passed, became an integral part thereof as from the date of the commencement of the Act, i.e., 1 January 1967 by virtue of Act No. 15/67. The sub-section together with its proviso is as follows:

> 5(2) The amount of the fair rent of any controlled premises shall be, in the case where it is determined by an agreement between the landlord and the tenant, such sum as may be agreed upon between them, and in the case where it is determined by the decision of a Rent Officer such amount as may be fixed by him provided that the same is accepted by both parties; and in the case where it is determined by the order of the Tribunal, such sum as the Tribunal may consider reasonable.
>
> Provided that the amount of the fair rent per mensem of any controlled premises shall not in any case exceed -
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> (a) one-twelfth of the annual value of the controlled premises; or
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> (b) the amount of the rent per mensem of the controlled premises immediately before the commencement of this Act together with an increase of 100 per centum thereof.
>
> whichever is the lesser.
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> In this subsection 'annual value' has the meaning assigned to it in the written laws in force with respect to local authorities.

It is the case of the tenant that since the Control of Rent Act 1966 cannot be contracted out by the parties, they are entitled to the refund of these three sums plus interest thereon.

The landlord did not deny that Rex Theatre is a rent controlled premises, nor did he deny the proposition of law that the provisions of the Act cannot be contracted out. His Counsel, however, submitted that the rents he received and agreed to under the two leases were perfectly lawful, because they were rents permitted and therefore saved by the proviso to 27 of the Act.

In order to appreciate the issues involved in this portion of the appeal it is necessary to trace briefly the history of control of rent legislation in Peninsular Malaysia. This legislation is not a new phenomenon. It was first introduced by the Colonial Government before the war. The Rent and Charged Land (Restriction) Enactment of the Federated Malay States (FMS Enactment No. 14/1940) which came into force on 21 September 1940 prohibited a landlord from increasing the rent of any premises unless there was an order to that effect by the Rent Assessment Board set up under the Enactment. Failure to comply with the prohibition rendered the recalcitrant landlord liable to a criminal prosecution and also to a civil proceeding for the recovery of excess rent. At that time, Malacca, Penang, Johor and Kedah each had their own separate Rent Control legislation (S.S. Ordinance No. 35/1939, Johor Enactment No. 25/1939 and Kedah Enactment No. 4/1360). The only States which had no such legislation were Kelantan, Perlis and Terengganu. After the war, the Malayan Union Government by M.U.Ordinance No. 22/1947 extended the application of the FMS Ordinance No. 14/1940 to these three States. With this extension all the States comprising the Malayan Union, then, had similar legislations concerning control of rent. These separate legislations were later unified. The unification was completed by the Malayan Union Legislative Council by passing an Ordinance entitled the Control of Rent Ordinance 1948 (M.U. Ordinance No. 6/1948) repealing and replacing its previous Ordinance No. 22/1947 and all the prewar legislations on the subject. When the Federation of Malaya Agreement came into effect, this legislation was in turn replaced by another Ordinance passed by the Federal Legislative Council. This Ordinance is the Control of Rent Ordinance 1956 (FM Ordinance No. 2/1956).

Like its predecessor - the M.U.Ordinance 6/1948 - the continuance in force of the F.M. Ordinance No. 2/1956 in any particular State depended upon the yearly resolution of the State Legislature extending its application thereto for the next 12 months following the termination of the period of current application. It appears that for some unknown reasons the State Legislative Assemblies of Kelantan, Perlis and Terengganu in certain years did not pass the necessary resolutions. This Ordinance, therefore, ceased to be applicable to those States in those years. This failure compelled them to revive the Ordinance by passing their own separate Control of Rent Application Enactments. These enactments are Kelantan Enactment No. 17/1964, Perlis Enactment No. 4/1961 and Terengganu Enactment No. 6/1960.

Finally, on 1 January 1967 the FM Ordinance No. 2/1956 and the three State Control of Rent Application Enactments were repealed by Parliament replacing them with the Control of Rent Act 1966 (Malaysia Act No. 56/1966).

In so far as Kelantan is concerned, the failure of the State Legislative Assembly to pass the resolution to extend the application of the and the consequent passing of Kelantan Enactment No. 17/1964 resulted in no control of rent legislation in the State in the period between 1 July 1964 and 31 December 1964. This period was a non-controlled period.

We now propose to examine the legality of these two rents, i.e. RM2,000 per month under the first lease and RM5,000 per month under second lease.

(a) The RM2,000 rent per month under the first lease:

The tenant asked for the refund of the excess of rent only from 1 January 1969 to the date of the expiry of the lease. 1 January 1969 was chosen obviously in order to avoid the application of statutory limitation. But in order to determine whether the claim is admissible or not, we must examine the legal status of this rent from the very beginning to the end of the lease with reference to the various changes in the law that have occurred. This study must be made with reference to the following periods:

(i) the period between 1 September 1963 to 30 June 1964;

(ii) the period between 1 July 1964 to 31 December 1964;

(iii) the period between 1 January 1965 and 31 December 1966;

(iv) the period between 1 January 1967 and 31 August 1973.

(i) ***The period between 1 September 1963 and 30 June 1964;***
This is the period when the rent was paid during the application of the FM Ordinance No. 2/1956 in Kelantan.

Under s. 3 of the Ordinance a landlord was prohibited from increasing, receiving or recovering rent in excess of "the maximum recoverable rent". This rent is a rent fixed by the Rent Assessment Board. The maximum recoverable rent is also called "the standard rent", which is defined as regards the premises let for the first time after 5 September 1945 to be rent fixed by the Board.

The rent of RM2,000 per month under the first lease was clearly not fixed by the Rent Assessment Board and no attempt was made by the parties to have it so fixed. It is therefore neither "the maximum recoverable rent" nor "the standard rent" within the meaning of the Ordinance. The parties had fixed the rent without reference to the provisions of s. 3 of the Ordinance and the rent therefore appeared to be illegal, though it was open to them, then, to take steps to have it fixed by the Board.

(ii) ***The period between 1 July 1964 and 31 December 1964:***
This is the non-controlled period during which there was no control of rent legislation in Kelantan, because of the failure of the State Legislative Assembly to pass the requisite resolution for the continued application of the FM Ordinance No. 2/1956.

During this period the illegality ceased and the rent was, therefore, legal and lawful. In any case, the question of excess also did not arise because the refund was not asked for in respect of rent paid during this period.

(iii) ***The period between 1 January 1965 and 31 December 1966:***
This period is the period during which the Kelantan Enactment No. 17/1964 was in force reintroducing the control by bringing back to life the discontinued FM Ordinance No. 2/1956. This Enactment modified the definition of "standard rent" as follows:

> "Standard Rent" means the rent at which the tenant had paid or had agreed to pay the landlord **on the 30th day of June 1964,** or in the case of premises which were then unlet, unoccupied or unbuilt, the rent at which the premises was first let after the 30th day of June 1964.

The legislature had changed the cut-off date from 5 September 1945 to 30 June 1964. The purpose is clearly to prevent the revival or the reintroduction of the previous illegality attached to the rent, which illegality had become lawful during the non-controlled period and to preserve the legality of rents contracted during the period. Under the Enactment such rent must be treated as "the standard rent" and be allowed to continue its lawful status. The words "on the 30th day of June 1964" in the definition must mean "on or before the 30 June, 1964", otherwise the cut-off date would be meaningless. As the RM2,000 rent per month was the rent agreed to before 30 June 1964, and payable on that date the rent became "the standard rent" under the Enactment and was therefore perfectly lawful, despite the fact it was never fixed by the Rent Assessment Board. This lawful status continued until the FM Ordinance No. 2/1956 and the Kelantan Enactment No. 17/1964 were repealed on 1 January 1967 by the 1966 Act.

(iv) ***The period between 1 January 1967 and 31 August 1973:***
It is in respect of the rent paid during this period that the tenant asked for the refund. This period began with the coming into force of the 1966 Act and ended with the expiry of the first lease. The question here is whether the legality or the lawfulness of the rent under periods (ii) and (iii) was saved by the proviso to s. 27 of the Act.

We set out below the whole s. 27:

> 27. The following written laws are hereby repealed:
>
> (a) the Control of Rent Ordinance, 1956;
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> (b) The Control of Rent (Application to Kelantan) Enactment, 1964;
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> (c) the Control of Rent (Application to Perlis) Enactment, 1961;
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> (d) the Control of Rent (Application to Terengganu) Enactment, 1960.
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> Provided that... rents permitted under the provisions of the said Ordinance or of any Ordinance or Enactment repealed by the said Ordinance and in force at the commencement of this Act shall continue in force and have effect as if they had been made under this Act until superseded by ... rents permitted under this Act.

Counsel for the tenant submitted that the rent was not saved because the expression "the said Ordinance" in the proviso must only mean the FM Ordinance No. 2/1956 and does not therefore include any reference to the Kelantan Enactment No. 17/1964, which revived the said Ordinance during period (iii) above - between 1 January 1965 and 31 December 1966. We agree with the submission but in our view the most important expression in the proviso is "Enactment repealed by the said Ordinance."

The rents saved by the proviso are the rents permitted under:

(1) "the said Ordinance"

(2) "any Ordinance"

(3) "Enactment repealed by the said ordinance".

We accept that the expression "the said Ordinance" must mean the FM Ordinance No. 2/1956 which was repealed by the Act. As regards the expression "any Ordinance" this must have been intended to refer to the M.U. Ordinances No. 22/1947 and No. 6/1948. But what meaning could we ascribe to the expression "Enactment repealed by the said ordinance and in force at the commencement of this Act"? The FM Ordinance No. 2/1956 ("the said Ordinance") did not **repeal** any Enactment at all. It only repealed the M.U. Ordinance No. 6/1948. The repeal of the pre-war Enactments was done by the said M.U. Ordinance No. 6/1948 when it unified all the separate pieces of control of rent legislations. But the repeal of the Control of Rent Application Enactments of the States of Kelantan, Perlis and Terengganu, which revived the FM Ordinance No. 2/1956, after it had lapsed, was not done by "the said Ordinance", but by the 1966 Act. It is absolutely absurd to read the expression "the said Ordinance" in the context of the repeal of those Enactments to mean the FM Ordinance No. 2/1956. This absurdity is clearly due to a draftsman error, which we would not ascribe to be the intention of Parliament. In our view the expression "Enactment repealed by the said Ordinance" must have been intended by Parliament to mean "Enactment repealed by this Act." We are fortified in taking this view because of the expression "and in force at the commencement of this Act" which comes immediately after and, therefore, qualify the phrase "Enactment repealed by the said Ordinance".

Only the Enactments of these three States were in force at the time. Thus whatever rent permitted under the Kelantan Enactment No. 17/1964 is also permitted under the proviso to s. 27 of the 1966 Act and must continue to be lawful "until superseded by rules and orders made and rents permitted under this Act".

This rent ceased to be payable on 31 August 1973 upon the expiry of the first lease without any action taken by the parties to bring the same within the regime of the Act. i.e. to make it to be "the rent permitted under' the Act. The new concept of "fair rent" introduced by the Act does not automatically render illegal the standard rents which were lawful under the previous repealed legislations. The proviso to s. 5(2) of the 1966 Act only sets out the principles on which the fair rent of any premises must be fixed. But until such rent was fixed in accordance with the Act, i.e. by a mutual agreement of the parties or (in the absence of such agreement) by a Rent Officer or (in the case of his decision being disputed) by the Rent Tribunal, there is no question of excess of rent which would entitle the tenant to bring a suit to recover it. In our judgment the tenant's claim to recover the rent paid under the first lease fails.

(b) The RM5,000 rental per month under the lease agreement:

This rent was fixed by the parties under the second lease signed on 28 February 1974. The law which governs this rent is the 1966 Act. It is clear from the correspondence that the parties had never addressed their minds to the provision of s. 5 of the Act when they negotiated and signed the lease. Under this section it is mandatory that the landlord must only receive a fair rent for his premises. If he receives a rent in excess of the fair rent he renders himself liable to a criminal prosecution and to a civil suit for the recovery of the excess. But the fair rent under the Act is again not for the Court to fix. It is fixed by mutual agreement of the parties or in the absence of such agreement, by the Rent Officer or by the Tribunal if the fixing by the Rent Officer is not acceptable to the parties. Until this is done, notwithstanding the fact that the rent agreed to under the second lease may appear to be grossly in excess of the amount of what a fair rent should be, the Court must not exercise jurisdiction to fix what the fair rent is, as it is not its function to fix it. Only when the Rent Officer, or the Tribunal charged with the responsibilities of doing this fails to do so would the Court be willing to step in. If the Rent Officer or the Tribunal refuses to act, they can be compelled to do so, and if they act but do so on wrong principles their decision could be corrected or questioned in the Court. But until then the Court should not exercise jurisdiction. We, therefore, agree with the judgment of Ibrahim J (as he then was) in *Haji P.M. Abu Bakar v. Madam Gan Jin Sim* (Kota Bharu High Court Civil Suit No. 43 of 1966) when he said:

> ... the rent... demanded by the Plaintiff... would therefore appear to exceed the limit prescribed by the said section 5(2). However, until a fair rent has been determined in accordance with section 7 of the 1966 Act any rent permitted under Kelantan Enactment No. 17 of 1964 is also permitted under the 1966 Act by virtue of section 27 thereof and its proviso...

The conclusion reached by us as regards the suit No. 57/75 is that:

(1) the RM2,000 rent is permitted under the proviso to s. 27 of the 1966 Act and therefore lawful, it being permitted by the repealed Kelantan Enactment No. 17/1964.

(2) it is not for the Court to determine the fair rent, as regards the RM5,000 rent under the second lease agreement.

There is no question of excess of rent having arisen and as such no recovery thereof could be claimed.

In conclusion the tenant's appeal in respect of CS No. 89/75 is allowed with costs and their appeal in respect of CS No. 57/75 is dismissed, also with costs.

As the LBKB was drawn into the dispute between the landlord and the tenant by the landlord's apparent show of charity of insisting to pay higher rates, the cost of the LBKB should, in our judgment, be borne by the landlord.

The deposit for this appeal should be refunded to the appellant.

Also found at [1984] 1 CLJ 233